No. 12,593

IN THE

United States Court of Appeals

For the Ninth Circuit

NELDA SHANAHAN,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,

Appellee.

APPELLEE'S BRIEF

A. B. DUNNE
LOUIS L. PHELPS
DUNNE & DUNNE
333 Montgomery Street
San Francisco 4, California
Attorneys for Appellee

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

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APPELLEE'S BRIEF

I.

STATEMENT OF THE CASE

Preliminary

It is necessary to state the facts. Appellant's statement studiously avoids established facts and the basis of the jury's verdict for the defendant. This is coupled with a contention that the court need only review "appellant's evidence" to consider claims of error (Appellant's Op. Brief, p. 2), which, even as made, are technical only, in the

hope that there will thus be by-passed that review of the case as a whole which demonstrates that the jury could not fairly have reached any other result.

At about 7:45 of the morning of December 27, 1948 (see pleadings, R. 35, 69), Ellis E. Shanahan drove his automobile onto the tracks and directly in front of a Southern Pacific passenger train, the Beaver, which was proceeding south on its regular daily run through the unincorporated town of Anderson, California. Shanahan's car was hit as it drove in a westerly direction over the second set of tracks, the mainline (R. 65, 121, 306, 357, 400, 469, 487). He was killed instantly.

Before reaching the track on which he was struck Shanahan had passed a boulevard stop sign from which point, if he had stopped,[1] he could have seen northerly up the track, the direction from which the train was coming, more than a mile.[2] The only direct evidence was that the wig-wag signal was working[3] (R. 399, 401, 469, 470, 471) and that the crossing whistles from the train were properly sounded[4] (R. 302, 303, 331, 355, 356, 359, 360, 390, 401, 428, 429, 457, 458, 469, 472, 481). In spite of the wig-wag and the clearly visible train, Shanahan drove on. He had to first cross a

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1. Appellant claims that Shanahan did stop at the stop sign, but the witnesses on whom she relies were clear in their testimony that the only stop made was at the bottom of a slight incline leading to the tracks. This claim is discussed in detail below (pp. 25-29).

2. There was an attempt by appellant to dispute this, but the diagram and photograph reproduced show that the view was unobstructed.

3. Evidence of witnesses who saw and heard the wig-wag working is set out below (pp. 11-18).

4. Two independent witnesses, Lela Johnson and Alex M. Andree, as well as three trainmen and the engineer and fireman, testified that they heard the signals.

house track, which was clear at the time, and his view up the track was unlimited.[5] He could have stopped easily at his speed of about five miles[6] an hour if he had looked, and if he had looked he would have seen the approaching train which was bearing down on him, its headlights on,[7] its whistles sounding.

The Facts of the Accident

Shanahan, an employee of the Internal Revenue Department of the United States, was a resident of the town of Anderson. He had lived in the vicinity since he was a boy, more than thirty years (R. 161), and had been Justice of the Peace of Anderson Township (R. 162). The Shanahan home was east of the Southern Pacific Company's mainline track, which passed through the town of Anderson. U. S. 99, the main automobile highway up the Sacramento Valley, lies directly west of the tracks. He crossed the tracks daily in going to and from work. The train involved in the accident was a regularly scheduled passenger train. It was a little late on its running schedule, but appellant established by the local constable that this was to be expected because it normally came through Anderson between 7:20 and 8:00 A. M. (R. 168). Shanahan was thoroughly familiar with the crossing and the railroad tracks and railroad operations.

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5. The first track which Shanahan came to was clear. The photograph reproduced shows the unlimited view Shanahan had while still eight feet east of this track and twenty-six feet east of the center line of the main track. Neither the station nor any cars blocked Shanahan's vision.

6. This estimate is from appellant's witnesses Hewes and DeRosa. The fireman saw the car approaching but could not estimate its speed (R. 356). Another witness, Griffith, estimated the speed at 8 to 10 miles per hour (R. 413-414).

7. There were two lights on bright, one above the other, shining directly down the track.

The Southern Pacific mainline runs north up the Sacramento Valley through the unincorporated community of Anderson and on to Redding and points north. Howard Street runs westerly into Center Street in Anderson and after an offiset to the south along Center Street continues on westerly across the railroad tracks to Highway 99 (see diagram, Exhibit D and photographs reproduced) at a point 146.7 feet south of the Southern Pacific station (R. 204).

The crossing is protected by a standard wig-wag signal (R. 272), the familiar mechanical device that swings back and forth, displays a red light in the disc of the pendulum and rings a bill (see photographs reproduced). In addition there was the usual standard crossbuck warning and approaching the tracks from the east (as the deceased did) there was an arterial stop sign 33.7 feet east of the center of the mainline track (R. 203) requiring all motorists to stop before crossing the tracks.[8]

A conception of the locality, position of the street, the railroad tracks, the wig-wag signal, the arterial stop sign, the station, location of fixed objects and the like can best be had from a diagram, Defendant's Exhibit D.[9] This diagram is reproduced herein for convenience of the Court. In reproducing it, a reduction in size was made. Distances can be scaled on the original exhibit on the original scale, or distances can be scaled on the reproduced diagram, for

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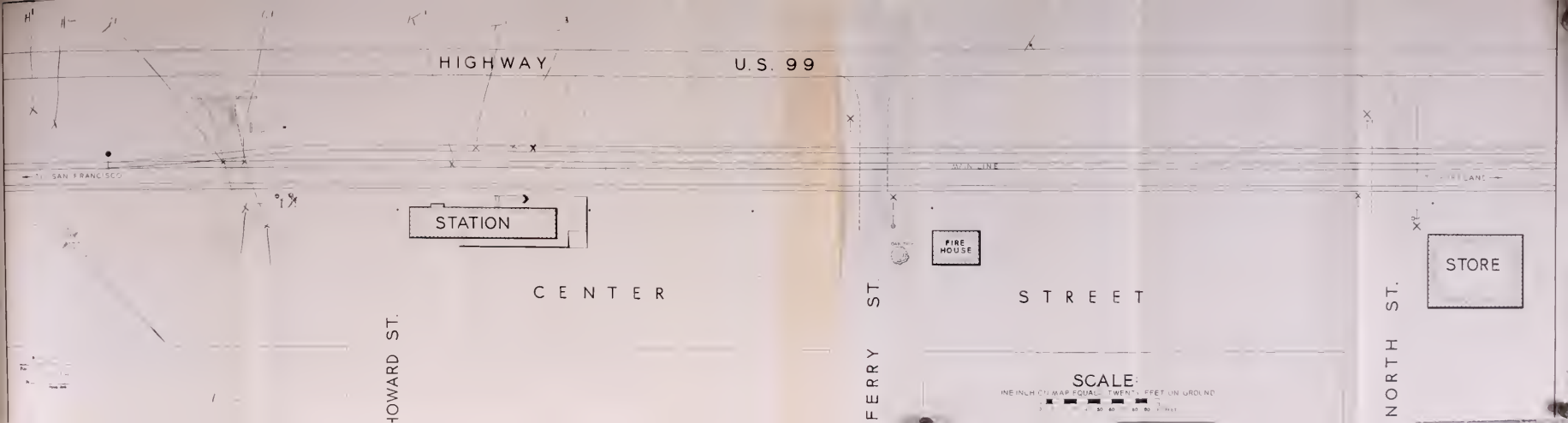
8. Evidence that Shanahan did not stop at the sign is detailed below.

9. Introduced as Defendant's Exhibit D. It was prepared by an engineer from a survey and is accurately drawn to scale. The diagram introduced on Appellant's case was not established by the person making it and was introduced for illustration only and not as a scale diagram.


HIGHWAY
U.S. 99
STATION
CENTER
HOWARD ST.
FERRY ST.
STREET
FIRE HOUSE
STORE
NORTH ST.
SCALE

though the scale on the exhibit will not apply, the graphic scale on the diagram was, of course, reduced proportionately and in the same ratio as the diagram as a whole.

Three tracks cross Howard Street. From the east the first track reached is a house track.[10] West of this track 18.3 feet is the mainline (R. 203) (where the accident happened). The third and most westerly track is the passing track.[11]

The view of the driver approaching the tracks from the east is demonstrated by pictures in evidence. Defendant's Exhibit M is here reproduced showing the view down the tracks in the direction from which the train was coming.[12] Opposite the arterial stop sign the view up the track is open and free.[13] A straight edge placed at a point on the road opposite the stop sign and just clearing the station building demonstrates this.[14]

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10. The house track is the first set of rails seen in the photograph reproduced. There was nothing on this track at the time of the accident.

11. A freight train was on the passing track, but the nearest car was north of the station. This train did not block Shanahan's view of the approaching train.

12. The photograph reproduced is Defendant's Exhibit M taken on Howard Street, 26 feet east of the center of the main line track and looking in a northerly direction from which the train was coming (R. 265). It shows the driver's view at that point. The first or nearest set of tracks is the house track and not the track where the collision took place.

13. The stop sign is only 7.7 feet east of the point where the photograph (Exhibit M) was taken. The diagram demonstrates that nothing obstructs the view from the stop sign.

14. The station building in the reproduced diagram is defined by the heavy black line with hatch marks. Lines west, north and east extending out from the station indicate a loading platform seen in the photograph. This is not high enough to obscure the view of a train. The straight edge should be along the station proper indicated by the heavy line with hatching.

Before turning from Center Street into the Howard Street crossing there is a slight incline up to the tracks. This is shown on Defendant's Exhibit I, which has been reproduced.[15] The start of the incline is fixed on the diagram by the easterly end of the most northerly dotted line of Howard Street extending into Center Street (R. 213). As will appear later, it was at this point that Shanahan stopped and from this point continued on without stopping again until the collision.[16] The view at this point was somewhat obscured by the station. The station did not obscure the view at the boulevard stop sign where he should have and, indeed, was required to stop.[17]

Approximately an hour (R. 403) before the accident a northbound freight train had pulled into the passing (most northerly) track and had stopped with its caboose north of but in the vicinity of the station (R. 395).[18] The Howard Street crossing was clear. There were no other railroad cars around (R. 157, 158) and the train on the passing track did not obstruct the view of the main line from the east (R. 158).

Shanahan drove south parallel to the tracks and along Center Street immediately before the accident and as he

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15. The photograph reproduced is Defendant's Exhibit I taken at the intersection of Howard and Center Streets, 100 feet east of the main line track, and looking in a westerly direction. It shows the bottom of the slight incline where Shanahan was seen to stop. Obviously this is marked by the puddle showing in the picture. The stop sign can be seen at the top of the incline and a considerable distance west. The wig-wag signal is also shown.

16. There can be no doubt that Shanahan stopped only at the bottom of the incline (R. 99, 133, 134, 136). This is discussed in more detail below.

17. See footnote 13, p. .....

18. The train on the passing track, being clear of Howard Street, did not activate the wig-wag. The wig-wag commenced functioning with the approach of the passenger train.

Defendant's Exhibit I

did so he was seen by the occupants of an automobile which turned left from east Howard Street behind the Shanahan car. From this point on Shanahan's conduct was observed by these two men, *Hewes* and *DeRosa* (59-65, 75-80, 116-121, 130-139), called as witnesses by the plaintiff, and his crossing of the railroad tracks and the accident was witnessed by three other persons.[19] These witnesses were *Mrs. Lela Johnson*[20] (R. 466-491), a woman living at Anderson, *Philip S. Kafer*[21] (R. 347-382), the fireman on the train involved, and *Luther L. Griffith*[22] (R. 392-424), the conductor of the train which had stopped on the passing track. His actions having been thus observed and described by these witnesses, and the physical facts and the sounding of warnings (R. 389-390, 428, 429, 457, 469) and the operation of the wig-wag having been established by other witnesses[23] (R. 469-470, 471), the jury could quite properly determine for itself how Shanahan drove over the crossing and what care, if any, he took for himself. There was no compulsion for the jury to find in accordance with any presumption in this regard.

Shanahan was seen to drive up to the foot of a slight incline east of the railroad tracks at the Howard Street

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19. Appellant's Opening Brief (p. 8) states that there were only two eye witnesses to the accident. This is wrong.

20. Mrs. Johnson saw the approach of the train, heard its whistle being sounded, saw the headlights, saw and heard the wig-wag operating at Howard Street and saw the Shanahan car before and at the instant of the impact.

21. Kafer saw the Shanahan automobile approach and hollered to the engineer to apply the brakes.

22. Griffith saw and heard the train approaching, saw and heard the wig-wag working and saw the automobile approaching the crossing before it was struck.

23. Lela Johnson. Her testimony is quoted at length below.

crossing where he stopped[24] (R. 133, 134, 135, 99). He was then 50 feet[25] east of the nearest track and 68 feet[26] east of the track on which he was struck. He was observed to rub his hand over the inside of the windshield of his coupe (R. 61, 79, 118, 119), wiping the portion directly in front of him.[27] Evidently, he was endeavoring to wipe off the moisture that had formed on the inside of the windshield, the same moisture that steamed up the windshield of the car occupied by Hewes and DeRosa (R. 61, 79, 118), directly behind him. He was not seen to wipe the windshield and window to his right[28] (R. 79) where steam would obstruct his view of a train coming from the north. There can be no presumption that he took this precaution.

Meanwhile, Southern Pacific Company's passenger train No. 13, the Beaver, was running southward, from Redding, through the unincorporated community of Anderson. The train was a few minutes behind schedule but this was not unusual for this train (R. 168) and it was proceeding at a speed variously estimated at between 65 and 70 miles an hour and within the speed restrictions set by the company,[29]

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24. See footnote 16, p. 6. This is fully discussed, pp. 25-29.

25. This distance can be scaled on the diagram reproduced.

26. The nearest track was 18.3 feet east of the main line.

27. The windows of the Shanahan car were up. Highway Patrol Officer Sublett investigated the wrecked car and testified that the windows were up. There was no testimony by Hewes or DeRosa that Shanahan wiped off the windshield on the right hand side or the side window. If the windshield in front of him was steamed up the other windows were also.

28. His actions were described by Hewes and DeRosa.

29. That the speed, even at 70 miles per hour, was within the permitted speed was established by the engineer. There was then an objection and the question was withdrawn upon counsel's statement, in effect, that no claim of violation of company rules was asserted (R. 303-304).

and a lawful speed. The fixed headlight was on bright, not dim (R. 321, 354, 355). The Mars light, the extra headlight that swings from side to side, to give the engineer a vision to the side of the beam of the fixed headlight, had been centered (R. 321, 354, 355, 363), as railroad rules required, on approaching the freight train, to permit the freight train crew to identify the passenger train. The Mars light with the main headlight, was trained directly down the track. All of the necessary crossing whistles were sounded[30] and this was established by independent witnesses[31] as well as the engineer and fireman of the passenger train and the crew members of the freight train.[32]

As the passenger train approached the Howard Street crossing the wig-wag at that crossing began to operate (R. 399, 400, 469, 470, 471). It moved backward and forward, the red light came on and the bell sounded. This is the testimony of eye-witnesses.

Notwithstanding all of these warnings, Shanahan, in the face of the train, started up from his position at the foot of the slight incline at the Howard Street crossing, passed the boulevard stop sign, where by law he was required to stop, and proceeded across the first track and onto the next set of tracks, the mainline, where he was struck by the engine of the passenger train. Some 200 feet north of the crossing (R. 358, 359),[33] the fireman, from whose direction

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30. Crossing signals were sounded for other crossings in the vicinity as well as Howard Street. The bell was ringing as well.

31. Lela Johnson and Alex M. Andree.

32. Griffith and Thomas. In addition the head brakeman, Caillouette, of the passenger train heard the whistles.

33. Kafer estimated that he was about opposite the train order post which would scale on the diagram at about 220 feet from the crossing. The mark he made on the diagram scales at about 170 feet from the crossing.

Shanahan was coming, saw the automobile driving onto the tracks, shouted to the engineer and the emergency brakes were applied immediately (R. 356, 357, 305, 306). The train was unable to stop. The Shanahan automobile was struck directly behind the right hand door, thrown to the side of the track, and Shanahan was immediately killed.

The accident happened in the early morning. It was "breaking day." There was sufficient light to see objects at a distance without artificial light, although it was still somewhat dark. The weather was cloudy, overcast, and described as somewhat "misty" (R. 148, 72, 309, 403, 472, 473, 482). There was sufficient moisture in the atmosphere, and it was sufficiently cold, so that automobile windshields and windows "fogged up" or steamed up (R. 78, 152).

The evidence established that Southern Pacific train No. 13 was operated properly, and that the wig-wag signal, the crossing protection at the Howard Street crossing, functioned properly. The engine had sounded crossing whistles, in fact had whistled almost continuously since entering Anderson, and its headlights were on bright. The deceased drove his automobile directly into the path of a fast moving locomotive despite the fact that the crossing wig-wag gave warning of its approach and it was clearly visible to him, had he looked for it. There could be no presumption that he looked. He was not seen to turn his head. Had he looked he must have seen. The facts abundantly demonstrate that there was no negligence on the part of the Southern Pacific Company, the respondent, and that Ellis E. Shanahan negligently and carelessly operated his motor vehicle so as to drive it directly into the path of the train. The facts conclusively established that Southern Pacific was entitled to verdict, and the jury gave it its verdict.

Assumptions and Claims of Appellant Not Supported by the Record

Appellant made various claims of negligence, and various claims to excuse deceased's contributory negligence, none of which the jury would accept. One obvious reason for this was that the claims which were made before the jury were not supported by the evidence. Again on appeal we find appellant making assumptions, statements and claims in her behalf which are contrary to the record and a distortion of the evidence.

We do not undertake to discuss all of the inaccuracies in appellant's brief but shall confine ourselves to an exposure of some of the most exaggerated claims made by appellant.

THE WIG-WAG.

There was a contention that the wig-wag did not function, but *appellant's contention that the wig-wag did not functions is contrary to all the direct evidence.* In her brief appellant, without qualification, represents as an established fact that the wig-wag was not working. To so state is to arbitrarily disregard the evidence of the only eye witnesses who saw the wig-wag operating and is an imposition on the Court.

That the wig-wag was operating was established to the satisfaction of the jury by the unqualified testimony of witnesses who saw and heard it just before the accident.

Mrs. Lela Johnson, an independent witness, a resident of Anderson, saw the accident from her front yard. Her testimony left no doubt that the wig-wag was going, its light on and bell ringing as the Shanahan automobile drove onto the crossing. She testified:

"Q. I am asking you if at any time that you were standing there in your front yard that morning and as the train was coming up to the crossing and as the car approached the crossing, did you see a wigwag?

A. I saw it then when I looked at the crossing.

Q. When you looked at the crossing, can you tell us whether or not the wigwag was in operation?

A. It was working and the bell was ringing.

Q. **Did you hear the bell ringing?**

A. **Yes, sir, I heard the bell ringing.**

Q. **Did you see a light on the wigwag?**

A. **Yes, sir, I did.**

Q. **Did you see it wag back and forth?**

A. **Yes, I sure did.**" (R. 469-470)

She further testified:

"Q. That is when you saw the automobile at that time? A. Yes, I saw the car.

Q. And at the same time you saw the wig-wag in operation? A. Yes, sir, it was.

Q. And had you heard the bell on the wig-wag before that? A. Yes, sir, I had.

Q. Had you heard the bell on the wig-wag before you heard the whistle for the train or after?

A. Well, I heard the train coming down the track, then I paid attention to the bell. **The wig-wag was running before the train got there and the bell was ringing.**" (R. 471)

Luther L. Griffith, was the conductor on the freight train which was in the siding at the time of the accident. His train had pulled into the siding about one hour before to permit three southbound trains to go by. He observed the wig-wag signal working properly for the two trains that

preceded the one involved in the accident.[34] The wig-wag, its bell and light, were seen by him to function as it was intended to. As the passenger train involved approached he was standing on the station platform and crossed over to a position behind his caboose (R. 398). He saw the Shanahan automobile approaching the crossing. He testified that the wig-wag was working at that time. His testimony was:

> "Q. Then will you tell us as best you can, as you were standing there behind the caboose, the train went by; first, can you tell us whether or not you made any observation as to whether the wig-wag was working?
>
> A. **The wig-wag was working.**
>
> Q. This was as 13 was approaching the crossing?
>
> A. No. 13." (R. 399)

Highway Patrol Officer Lloyd Sublett responded to an emergency call, and arrived at the scene of the accident to investigate it at about 8:15 A. M. (R. 215). He was still in the course of his investigation when the signal maintainer, James R. Rowe, arrived on his track car to make a test of the signal (R. 219-220). The wig-wag signal had not been touched up to this time and Officer Sublett went with Signalman Rowe to observe the results of the test. Also present was the coroner (R. 219). In the presence of Officer Sublett and the coroner, the wig-wag was tested and found to be working properly. Highway Patrol Officer Sublett's testimony is perfectly clear:

> "Q. All right, now, will you tell us what was done in testing the bell and what the results of that test were?
>
> A. Well, Mr. Rowe opened up the control that

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34. A southbound train had come through Anderson only about 10-15 minutes before the accident. The signal worked properly then (R. 397).

houses the relays that operate the bell and he short-circuited the relays out, the bell started ringing, and **I observed the light was lighted, the red light,** and the banner of the wig-wag.

Q. That is the red light in the wig-wag was burning?

A. Yes.

Q. The bell rang properly?

A. That's right.

Q. And what about the movement of the arm of the wig-wag?

A. **It moved as normally should, normally does.**

Q. And you tested more than once, he tested it more than once—

A. Yes, he tested, those relays, one for the southbound movement of trains, one for the northbound movement, and he tested it two or three times to see if it would operate each time, which it did." (R. 219-220)

Although the signal worked properly upon these tests and no repairs were required and none were made (R. 283), Officer Sublett made doubly sure by returning to the scene of the accident later on in the morning of the same day to observe for himself the workings of the signal when activated by both southbound and northbound trains. He testified that it worked properly, as follows:

"Q. Now then, may I ask you this: Did you make any other observations of your own with respect to the working of that wig-wag signal on that day?

A. Yes, on two occasions I **checked the operation of it while trains were passing the point and approaching the wig-wag.**

Q. And did it operate correctly on that occasion?

A. It did.

Q. And will you tell us whether that was for a movement—when the train moved over the main line?

A. Yes, it was a train moving through and passing right on through the town of Anderson in both cases.

Q. Can you tell us whether it was from the north or from the south?

A. The first train was a freight train from the north. The second train was a train, No. 16 from the south." (R. 221-222)

Signal Maintainer James R. Rowe testified to his inspection after the accident and that the signal worked properly (R. 281-282), that no repairs were made and none was required (R. 283). He also testified that the wig-wag signal was tested by him regularly on working days and he explained the manner in which it operated. The signal is so constructed that in the event that something goes wrong with the signal a separate circuit supplied by a battery will cause the wig-wag to commence operating, so that, if out of repair the signal will commence its warning rather than fail to work for the passing motorists (R. 272-275).[35]

From this evidence there was only one conclusion which the jury could have drawn and that was that the signal was operating properly at the time of the accident. There was an attempt by the plaintiff's witnesses, Hewes and DeRosa, to say that the wig-wag was not working because they did not see it. The attempt failed, however, when both of these witnesses admitted on cross examination that they could not say whether the wig-wag was working or not (R. 87-88, 158-159).

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35. Rowe testified that in his experiences as a signal maintainer he knew of no condition that could cause the signal to work properly when tested as he did but to not work 2-2½ hours before (R. 287-288).

Hewes was confronted with a statement taken immediately after the accident which he admitted he made and which he finally admitted was a true and correct statement. In his statement immediately after the accident he had said **"I cannot state whether or not the wig-wag signal at the crossing was operating at the time of the accident or not * * *"** Counsel for plaintiff, in an effort to keep this statement out of evidence placed his own construction on the witnesses' prior testimony and in effect admitted that, whatever he may now claim for Hewes testimony, it could mean no more than that he did not know whether the wig-wag was working or not. The record in this respect is:

> "Mr. Phelps: I will read this to you and ask you if you made this statement and if it isn't true and correct and this was what you said at that time: 'I cannot state whether or not the wig-wag signal at the crossing was operating at the time of the accident or not, although I did not see any type of light burning or any signal at the crossing and did not observe any signal at the crossing. I also did not hear any signal bells ring, but this may also be due to the fact that the windows were closed on my car.'
>
> **Mr. Murman: I submit that is not impeaching, if your Honor please. That is consistent with the witness' testimony.**
>
> Mr. Phelps: Well—
>
> The Court: Just a minute. I will allow the matter that has been read to stand in the record.
>
> Q. (By Mr. Phelps): Did you make that statement?
>
> A. That is right.
>
> Q. That is still true and correct, isn't it?
>
> A. That is right." (R. 87-88)

John L. DeRosa, also called by the plaintiff, readily admitted that his testimony could not go beyond the fact that he did not know whether the wig-wag was working or not. He testified:

"Q. And you did not know whether it was working or not?

Mr. Murman: That is the same thing. Your Honor, he can only testify to what he saw, can't testify whether it was working or not.

The Court: I will allow the question. Do you know whether or not it was working?

A. As my memory serves me, I can't remember of seeing it working, no.

Q. **So that answer would mean, of course, you don't know whether it was working or not, isn't that fair to say?**

A. **Precisely.**" (R. 158-159)

If there be any doubt that the testimony of Hewes and DeRosa established nothing and that no inference could be drawn from their testimony that the signal was not working, it was set at rest by the testimony of Highway Patrol Officer Lloyd Sublett, who interviewed both Hewes and DeRosa on the day after the accident. He asked them both whether they knew whether the signal was working or not. They said they did not know. He asked them both whether they had looked for the signal. They admitted they had not looked.[36] The officer testified as follows:

"Q. And in the course of that investigation did Mr. Hewes tell you that he didn't know whether the wig-wag was working or not?

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36. If they did not look they could not know whether the signal functioned and any claimed testimony from them would have no probative value.

A. Yes, he told me that.
Q. Did Mr. DeRosa tell you that also?
A. He also told me that he didn't know.
Q. And that he didn't look?
A. That's right.
Q. And the same is true with Mr. Hewes?
A. Yes." (R. 223-224)[37]

This is the state of the record and it is in the face of this evidence that appellant's opening brief represents to this Court flatly, without qualification, "the wig-wag crossing signal was not working * * *" (appellant's opening brief, p. 3).[38]

THE WHISTLE ON THE LOCOMOTIVE.

There was a contention that the whistle was not sounded by the train as it approached the crossing. It is stated as a fact by the appellant in her opening brief that "no whistles

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37. On cross examination officer Sublett again testified:
"Q. Don't you also remember that when you talked to Mr. DeRosa and Mr. Hewes they said they didn't see the wig-wag operating? A. Yes.
Q. So it wasn't that they were not sure whether it was operating or not, but they didn't see it operating, is that correct?
A. They said they couldn't tell me whether it was operating or wasn't.
Q. Didn't they also say they didn't see it operating?
A. They said they didn't look.
Q. Both of them said they didn't look?
A. Mr. DeRosa or Mr. Hewes, rather, told me that he didn't see it, he didn't look. I asked Mr. DeRosa if he saw whether it was operating or not, and he said, 'No, I didn't look, either.'
Q. Both of them said they didn't look? A. Yes.
Q. But in addition to that they said they couldn't tell you whether it was operating or not?
A. That is right, they said they couldn't tell me." (R. 231-232)

38. Appellee contended on the trial (and still does) that there was no evidence to support the allegations of the complaint that the wig-wag signal was negligently maintained or operated. A motion to withdraw this issue from the jury was made (R. 518). It should have been granted.

had been heard before that [before the collision] * * *." Again it is necessary to point out that appellant's statement, upon which she wants this Court to act, is not supported by the record. In addition to the engineer and fireman of the passenger train who respectively sounded the whistle and bell of the locomotive, the warnings were confirmed and were **heard by two independent witnesses**, residents of the community of Anderson, and by two members of the crew on the freight train which was in on the siding.[39]

Lela Johnson, testified that she heard the train coming, heard crossing warnings being sounded and because of this waited to watch the train as it proceeded south. Her testimony:

> "Q. Now, what was that that attracted your attention to the train? Did you hear any whistles before that?
>
> A. Well, as I was coming out my yard, I heard a train come away up the track, **and the whistle and horn was going and she was blowing and blowing** there at the crossing, you know, so when she gets down to Anderson near the station, you see, she blew a long whistle and horn. **Yes, sir, she blowed and that make me look more so**, then I kept my eyes right on her, and when I throwed my eyes to the crossing I saw this car come up and just as the car drove up on the track the train knocked it off." (R. 469)
>
> "Q. You heard the train when it was way down the track?
>
> A. Yes, a good ways up the track.
>
> Q. You heard the sound of the whistle for the Ferry Street crossing in Anderson?

39. It was also heard by Caillouette, head brakeman of the passenger train (R. 457).

A. Yes, for the Ferry Street crossing, before you got down to the Howard Street crossing." (R. 472)

On cross examination[39a] she said that she thought that the train was about a mile up the track when she first heard it. She testified:

"Q. What did you hear about the train?

A. I just heard the rumbling of the train and I **heard the whistle way up the track, seemed to me like it might be about a mile up the track.**

Q. Was it a whistle you heard, a steam whistle?

A. I heard a horn and the whistle.

Q. You heard a horn and whistle?

A. Yes, sir.

Q. When you say horn, what do mean by that?

A. Well, the steam whistle it blows and the horn goes something like this: Ahhhh-ahhhh-ahhhh." (R. 481)

Alex M. Andree testified that he saw the headlights of the locomotive and heard the whistles for all the crossings in Anderson, including those north of where the accident happened. Mr. Andree had lived in Anderson for about twenty years and had known both Mr. and Mrs. Shanahan well before this accident, and Mrs. Shanahan since. His testimony:

"Q. All right. As that train came down, came into Anderson, **what was it about that train that attracted your attention to it?**

A. **Well, the whistles.**" (R. 428)

39a. Mrs. Johnson's testimony came as no surprise to plaintiff's counsel, for on rebuttal he called a Mr. Wilbert G. Whitfield, who investigated the accident for the Department of Internal Revenue on behalf of the Federal Compensation Commission. Mrs. Johnson had told him on the day after the accident that she had heard the horn honking and the bell ringing as the train was approaching the crossing (R. 501-502).

"Q. Did you hear a whistle for any crossings north?

A. Another crossing above there—

Q. I am sorry—

A. (Continuing): They whistled for that crossing.

Q. What crossing is that?

A. That is the one between—there is two crossings up there between—between Spring Creek. There is one crossing this side and another crossing between the Signal Oil, the crossing there and the next crossing is North Street.

Q. All right, did you hear the train blow for those crossings? A. I did.

Q. You did. And did you hear the train blow for the other crossings in the town of Anderson?

A. Yes, he blew for North Street and the time he got down to Howard Street he opened her up again on Ferry Street, and it was still, still whistling when I walked into the house. I didn't pay much attention. I know there was a freight train to pull out, the whistle was still blowing out after he went through Ferry Street and I went inside." (R. 429)

Luther L. Griffith, conductor of the freight train, also heard the train whistling as it aproached the crossing. He testified:

"Q. Did you hear any whistle in this area of the station at the crossing as the train cut off your view?

A. **The whistle was blowing continually.**

Q. Tied the cord down?

A. Placed as a crossing whistle.

Q. The whistle was being blown continuously.

A. That is with spacing of a crossing whistle.

Q. Well, I suppose by that you mean it was blown separately for each crossing, but continuously as the crossings were approached?

A. That's right." (R. 421)

George W. Thomas, the brakeman of the freight train, had walked to a point north of the North Street crossing as the train approached. His testimony as to the whistle was as follows:

"Q. And can you tell us whether or not the train as it came into Anderson and after it passed you going through Anderson, were any crossing whistles sounded? A. Yes, they were sounded.

Q. Approximately where, as you now remember, were the whistles sounded?

A. Just as he passed on through, he started sounded for the North Street crossing.

Q. For the North Street crossing?

A. Yes.

Q. And thereafter did he continue to sound whistles? A. Yes.

Q. And were any whistles sounded for any crossing north of the North Street crossing?

A. Yes." (R. 389-390.)

Noel Caillouette, head brakeman on the passenger train, had opened the door as the train approached Anderson, to read the order board at the station. He heard the crossing signal approaching the crossing.

"Q. Now, then, did you hear the crossing whistle sounded at any time? A. Yes.

Q. And where were you when you heard the crossing signal?

A. Standing in the open door." (T. 457)

It is in the face of this overwhelming evidence that appellant states to this Court in its brief "no warnings were seen or heard until an instant before the fatal crash occurred" (Appellant's Opening Brief, p. 19). Again he states "no

whistles had been heard before that [the collision]" (Appellant's Opening Brief, p. 8). In the face of such testimony is it remarkable that the jury rejected appellant's argument that no warnings were sounded? Would it have been unreasonable for the jury to have found the fact to be that the whistles and bells were sounded and that in spite of the presumption of care for them to have found that he should have heard the warnings and heeded them?

Another claim of negligence made by the appellant, but not accepted by the jury, was speed of the train. There is no evidence that the speed of the train was unusual or improper or in violation of the law or of company rule.[40]

Still another claim was that there was no flagman at the crossing.[41] That attempt is to imply that one was customarily there but absent at the time. There was no flagman there and none was intended to be. The crossing was protected by a mechanical wig-wag signal.

Other claims made by appellant, again not supported by the evidence, are claims made in an effort to excuse the patent contributory negligence of the deceased. These claims relate to the physical conditions of the crossing and the claim that Shanahan stopped at the stop sign. The evidence, fairly viewed, will not support these claims.

THE VIEW AT THE CROSSING.

Appellant has stated in her brief that "visibility of appellee's southbound trains was obstructed by appellee's station and depot * * *" (Appellant's Opening Brief, p. 3).

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40. See footnote 29, p. 8.

41. Appellant's Opening Brief, pp. 3, 19.

Again she claims that Shanahan stopped, looked, and listened before attempting to cross "at the **blind Howard Street crossing** * * *" (Appellant's Opening Brief, p. 4). Still further on in her brief appellant claims that the "deceased's view of the speeding train, when he stopped to look and listen before proceeding over the tracks at the first available crossing was obstructed by appellee's station and depot" (Appellant's Opening Brief, p. 19).

That the view was not obstructed by the crossing from a point more than 40 feet from the main line track can best be demonstrated by reference to the diagram reproduced here. Certainly it cannot be doubted that at a point 33.7 feet from the center of the main line track, where the stop sign was located, the view is perfectly clear. It is obvious that the stop sign was located by the proper California highway authority with the view up the track in mind. The sign appears to be almost directly south of the most westerly building line of the station, so that at that point the entire station building is east of the line of vision and could not obstruct any view (Defendant's Exhibit D). The photographs reproduced here also demonstrate this.

Even if the stop sign had been placed back of the station (east) appellant's claim that the crossing was blind would still be a mis-statement. The station, by actual measurement is 146.7 feet north of the crossing (R. 204). A straight edge placed on the diagram and pivoting around the southwest corner of the station will readily demonstrate the view of the driver down the main line. Assuming the very worst, at a point still in Center Street and where the Howard Street crossing starts to curve away from Center Street (a point approximately 75 feet from the main line) the

main line can be seen past the station a distance of at least 240 feet.

The jury saw the photographs, saw the diagrams, and properly concluded that this was not a blind, obstructed crossing as claimed by appellant.

THE STOP WAS NOT AT THE STOP SIGN.

On the trial plaintiff's witnesses Hewes and DeRosa attempted to say that Shanahan drove up to the crossing and stopped in the vicinity of the stop sign.[42] This he was required by law to do and if there were any merit to the claim that he did stop at that point it would undoubtedly be stated as a fact in her Brief and added to the other extravagant claims made by appellant. It is of interest to note that appellant's brief studiously avoids stating where the stop was made.

On cross examination the witnesses Hewes and DeRosa admitted that Shanahan stopped at the bottom of the incline with his car still in the process of turning into the Howard Street crossing. It was at this point that he was seen to wipe the windshield directly in front of him. He then started up and continued on a distance, which can be scaled on the diagram,[43] of about 70 feet, continued in motion past the stop sign with his vision unobstructed to his right and was struck on the main line.

The place where he stopped is important. The rule is clear that the duty to look for approaching trains and to listen for them is not satisfied by looking at a remote spot, particularly where at a nearer point an unobstructed view

42. R. 62, 162.
43. Exhibit D.

can be had.[44] Appellant is caught on the horns of her own dilemma. If the view was obstructed at the point where Shanahan stopped, and this is her claim, then he must stop and look again at a point where he can see. There can be no doubt that there was such a point and that he could have seen if he had stopped at the stop sign or short of the first railroad track. This he was required to do in the exercise of ordinary care and the jury could well have agreed that he should have done so and that his conduct as described by his own witnesses was not consistent with the presumption of due care.

That he stopped at the bottom of the incline is abundantly established from the plaintiff's own witnesses. *John L. DeRosa* fixed the place where Shanahan stopped. His testimony was:

> "Q. Now, as the car driven by Mr. Shanahan came to a stop, can you locate the place where that car stopped with reference to the incline there at the crossing?
>
> A. Well, I believe that he stopped right **at the foot of the incline.**
>
> Q. You mean—pardon me, had you finished?
>
> A. Yes.
>
> Q. You mean by that, the front end of his car was at the bottom of the incline? A. Yes.
>
> Q. And so that, without regard to any other physi-

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44. This rule is well established. See the following:
Pacheco v. S. P. Co., 129 Cal. App. 610, 19 P.2d 251;
Green v. Ry. Co., 138 Cal. 1, 70 P. 926;
Calif. Rendering Co. v. P. E. Ry. Co., 205 Cal. 73, 269 P. 922;
Koster v. S. P. Co., 207 Cal. 753, 279 P. 788;
Stephenson v. N. W. P. R. Co., 208 Cal. 749, 284 P. 913;
Shannon v. N. W. P. R. Co., 209 Cal. 303, 287 P. 91;
Young v. S. P. Co., 182 Cal. 369, 190 P. 36; 189 Cal. 746, 210 P. 259.

cal obstruction or any other mark you might have put on the map, your recollection there and then at the time when you observed him was he stopped with his front end at the bottom of this little incline?

A. Yes, approximately that.

Q. And that it was only after he stopped that he went up this incline to reach the grade and level of the tracks? A. Yes.

Q. In other words, when he stopped, so it will be perfectly clear, his car was on the level of the grade of Center Street itself? A. Not exactly, no.

Q. Well, it was still at the bottom of that little incline and hadn't yet gone up the grade off of Center Street, isn't that right?

A. Yes." (R. 133-134)

The Shanahan car had not yet straightened up from its turn from Center Street into Howard Street. DeRosa testified again:

"Q. He hadn't yet straightened up yet and wasn't yet parallel with Howard Street. Now, I am talking about the Howard Street crossing, not Howard Street on the other side.

A. He wasn't quite parallel with the crossing." (R. 136)

Raymond Hewes established the Shanahan stop at the same place. His testimony:

"Q. Now, as this car came to a stop, Mr. Shanahan's car, which you subsequently found out was Mr. Shanahan's car, came to a stop, can you tell us where it was with reference to the little incline or up-grade that goes from Center Street?

A. It was towards the bottom of the incline.

Q. So that the front end of his car stopped at the bottom of the incline?

A. Yes, that is about right.

Q. Yes. And a little grade going up there, and that is the grade you have reference to?

A. Yes.

Q. It was only after then he started up after having come to a stop that he went up this incline and over the tracks?

A. Sure, he went over the tracks.

Q. I understand that, but what I am getting at is, he didn't progress up this incline any amount until after he had started up after he stopped?

A. **Started from the bottom and kept a steady speed.**

Q. So that whatever other physical facts we can determine, the point that you can now fix the place where he stopped, was the front end of the car was at the bottom of that incline—

A. Just about the bottom of it, I would say, yes." (R. 98-99)

From plaintiff's own witnesses then it was established that the only stop made by Shanahan was at a remote place and not at the stop sign as he was required by law to do. Other witnesses who saw Shanahan as he approached the crossing before the impact observed him moving steadily without stopping from points east of the stop sign.

Luther L. Griffith first saw Shanahan's car when it was between 30 and 40 feet east of the house track. It was moving then.[45]

Philip S. Kafer, fireman, placed the Shanahan car east of the stop sign when he first saw it and said that it was

45. On direct examination he had (apparently inadvertently) placed it 30 to 40 feet east of the main line (R. 400). On cross examination he corrected it to place it 30 or 40 feet east of the house track (R. 413).

moving about eight to ten miles an hour and continued on at that speed until the impact. (R. 368)

From the testimony of these witnesses it is perfectly apparent that Shanahan did not stop at the stop sign and that the only stop he made was at the bottom of the incline while still turning into the crossing. It is claimed by the appellant that the view was blind at this point.[46] This is not so but the view is more obstructed there than at the stop sign or at the first track. If the view was obstructed as appellant claims, on his theory it is submitted that the deceased was guilty of contributory negligence as matter of law in not stopping again where the view was open and clear. We are not required on this case to maintain this position for in this case the matter was submitted to the jury for its determination as a question of fact and the jury returned the only verdict it could in the circumstances.

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46. The duty is "to look for approaching cars at such point and in such manner as would enable him to determine if he could proceed in safety" (*Cal. Rendering Co. v. P. E. Ry. Co.*, 205 Cal. 73, 269 P. 922). To this end, the place selected for looking must be one where looking is effective (*Green v. So. Cal. Ry. Co.*, 138 Cal. 1, 70 P. 926; *Green v. L. A. etc. Ry. Co.*, 143 Cal. 31, 76 P. 719; *Pacheco v. S. P. Co.*, 129 Cal. App. 610, 19 P.2d 251 (holding that stopping for an arterial stop sign at a point where the traveler cannot see does not satisfy the railroad crossing rule)).

> "It is the duty of a traveler on a highway approaching a railroad crossing to use ordinary care in selecting a time and place to look and listen for coming trains. He should stop for the purpose of making such observation when necessary. It is his duty to use all of his faculties, and it is not enough if he merely listens, believing that the people in charge of any approaching engine will ring a bell or sound a whistle. * * * Stopping 35 feet from the crossing and trusting to his sense of hearing, when he might have obtained a clear view of the track by moving 18 feet and a few inches nearer, clearly indicates negligence. * * * A person approaching a railway track which is itself a warning of danger must take advantage of every reasonable opportunity to look and listen."
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> *Griffin v. San Pedro etc. R. R. Co.*, 170 Cal. 772, 151 P. 282.

COMMENTS ON APPELLANT'S STATEMENT OF FACTS.

The facts as revealed by the record are detailed above. Many of them appellant fails entirely to mention. Her statement of facts is so inadequate as to be actually misleading. For example, according to appellant there were two eye-witnesses to the accident, Hewes and DeRosa, (appellant's Opening Brief page 4) neither of whom, according to appellant, observed the wig-wag in operation. Actually there were five eye-witnesses, three of whom actually saw the wig-wag in operation, whereas the other two, Hewes and DeRosa, only testified that they were unable to say whether the wig-wag was working or not, that they had not seen it. If one does not see a wig-wag one is unable to tell whether or not it is operating. Appellant points out that there was no flagman at the crossing. There never had been a flagman at the crossing, and the crossing was never intended to be protected by a flagman. **It was protected** by the wig-wag crossing signal. Visibility of the southbound train was not obscured. Beginning at the boulevard stop sign, where a stop had to be made, train or no train, and continuing over the house track up to the mainline there was a clear view of more than one mile.

Appellant says no whistle was heard. Five witnesses testified that whistles were given and that whistles were heard. Appellant says that no headlight had been seen before that time, but there is evidence that the headlights were on bright and were so observed by eye-witnesses.

What appellant has done is to take only the testimony of two of her witnesses, testimony which even if it is what it is claimed to be is still thoroughly contradicted and disbelieved by the jury and by eye-witnesses to the accident. Having taken this testimony only appellant then attempts

to tell this court that what her two witnesses, unbelieved by the jury, observed are the facts of the case. As a statement of facts, it is an imposition on this court.

Just why Shanahan ignored the approaching train, the appellant never satisfactorily explained. He was in control of his own movements. He was in control of his own ability to see and hear. If anything interfered with his sight and hearing the slightest precaution would have removed the trouble. If he was blind to the train it was only because he did not see the train as it approached in plain view.

II.

STATEMENT AND DISPOSITION BELOW

This case was tried in the court below sitting with a jury. All issues of fact were submitted to the jury for its determination. The jury returned its verdict for defendant and appellee, and judgment was entered on that verdict. We have above detailed the facts and the evidence at some length. On the evidence before it and on the case as a whole the jury could not have reached any different verdict than it did. It is submitted that there was, and is, in this case a complete failure of proof of any negligence on the part of defendant and appellee.[47] It is also submitted that on the

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47. The charge of negligence as made by the complaint is as follows:

> "* * * defendants so maintained and operated the crossing signal and vehicle warning device of defendant corporation in such a careless, reckless and negligent manner as to cause a certain locomotive and train of defendant corporation, then and there carelessly, recklessly and negligently proceeding in a southerly direction along said tracks and right-of-way, to strike and collide without warning with said automobile, * * *." (R. 3)

There is no evidence to support any charge of negligence made by appellant. There is positive evidence that the crossing signals

evidence Ellis E. Shanahan, decedent, was guilty of contributory negligence as matter of law.[48] At the conclusion of the presentation of evidence appellee moved the court for a directed verdict. (R. 517-518) It is submitted that that motion should have been granted. It was not and the case was submitted to the jury. Appellant is now in no position to complain because the jury determined the issues against her. If by chance the jury had returned a verdict in favor of appellant such a verdict could not stand. Such a verdict would have had to be set aside on the ground of insufficiency of the evidence to suport a finding of negligence against appellee,[49] and on the further ground that decedent was guilty of contributory negligence as matter

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were operating properly, warning signals were properly given, and the train was otherwise properly operated in a careful and prudent manner. After denial of appellee's motion for directed verdict, appellee moved separately to withdraw from the jury the issues of negligence in the operation and maintenance of the crossing signal and negligence in the operation of the train (R. 518). It is submitted each of these motions should have been granted.

48. There was no room for any presumption of due care by decedent. Plaintiff's and appellant's own witnesses, DeRosa and Hewes, testified fully and in detail as to decedent's conduct. *Speck v. Sarver*, 20 C.(2d) 535; *Westburg v. Willde*, 14 C.2d 360; *Smellie v. Southern Pacific Co.*, 212 Cal. 540; *Rogers v. Interstate Transit Co.*, 212 Cal. 36; *Mar Shee v. Maryland Casualty Corp.*, 190 Cal. 1. Every case cited by appellant in her opening brief states the rule that under such circumstances any such presumption is dispelled as matter of law. The testimony of DeRosa and Hewes shows, as matter of law, that decedent was guilty of negligence by proceeding onto the tracks in front of the moving train without stopping, looking or listening at a place of safety and from which the view was unobstructed. Aside from the evidence produced by appellant, the evidence of appellee, uncontradicted and unimpeached, overwhelmingly shows contributory negligence of decedent as a matter of law.

49. There was no substantial evidence to support such a finding. Certainly there was not such a preponderance of the evidence as is required for the proof of any issue.

of law. On the other hand, it cannot be doubted that the verdict of the jury for the defendant and appellee is amply supported by the evidence, as appellant concedes on page 2 of her opening brief.

Of what, then, is appellant now complaining? She claims error in the instructions and error in the exclusion of testimony. At best the error claimed is of a highly technical nature. Under the applicable law and the facts of this case, the jury could not have reached any verdict different than they did. Assuming error as urged by appellant (and we earnestly deny any error as will appear below), such error could not have been prejudicial. On the whole case, considering all of the evidence, and considering the instructions as a whole, the jury could not have properly reached any different verdict and the verdict and judgment are manifestly right. There has been no miscarriage of justice. The cases are legion that where a decision or judgment is manifestly right and the error has not resulted in a miscarriage of justice, and where it cannot be said that without such error the verdict probably would have been different, the verdict and judgment will not be disturbed. It must appear not only that the trial court committed error but that the jury erred. We cite only a few of the many cases.[50] *Lawrence v. S. P. Co.,* 189 Cal. 434; *Saltzen v. Associated Oil Co.,* 198 Cal. 157; *People v. Estorga,* 206 Cal. 81; *Palmer v. James Granger, Inc.,* 4 C2d. 668; *Shuey v. As-*

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50. For cases in which error in instructions regarding the presumption of due care was found, and in which it was held the error was not prejudicial and not grounds for reversal, see *Speck v. Sarver,* 20 C.2d 585; *Tuttle v. Crawford,* 8 C.2d 126 (1936); *Paulsen v. McDuffie,* 4 C.2d 111; *Rogers v. Interstate Transit Co.,* 212 Cal. 36; *Roselle v. Beach,* 51 C.A.2d 579; *Collier v. Los Angeles Ry. Co.,* 60 C.A.2d 169; *Persson v. James Griffiths & Sons,* 85 C.A.2d 672.

bury, 5 C2d. 712; *Tuttle v. Crawford,* 8 C2d. 126; *Radisich v. Franco-Italian P. Co.,* 68 CA2d. 825; *Wood v. Moore,* 64 CA2d. 144; *Vitali v. Straight,* 21 CA2d. 253.

As was said in *People v. Estorga,* above, at page 85:

> "If it appears to our satisfaction that the result was just, and that it would have been reached if the error had not been committed, a reversal or a new trial is not to be ordered."

In *Shuey v. Ashbury,* above, the court said:

> "It is now settled law that a judgment will not be reversed by reason of an erroneous instruction, unless upon a consideration of the entire case, including the evidence, it shall appear that such error has resulted in a miscarriage of justice. The usual consequence is, that there will be no cause for reversal unless the evidence indicates that without such error in the instructions the verdict probably would have been different from the verdict actually returned by the jury."

Even if the evidence does not go so far as to have required a judgment for defendant as matter of law, still on the whole case the jury could not reasonably have found otherwise than it did and any assumed error as urged by plaintiff is immaterial.

But there was no error either in the instructions or in the exclusion of testimony. The matters now urged by appellant will be discussed in the same order as they appear in her opening brief.

III.

CLAIMED ERROR IN INSTRUCTIONS TO THE JURY REGARDING PRESUMPTION OF ORDINARY CARE

Appellant assigns as error the giving of an instruction requested by appellee (R. 542-543), and contends that it is inconsistent with the instruction given at the request of the appellant immediately preceding the instruction complained of (R. 542), respecting the presumption that Shanahan exercised ordinary care. The presumptions here in question are statutory and found in California Code of Civil Procedure § 1961 and § 1963. § 1963 provides as follows:

> "All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be contraverted by other evidence. The following are of that kind:
> * * * * * * *
> 4. That a person takes ordinary care of his own concerns;
> * * * * * * *
> 33. That the law has been obeyed; . . ."

The position now urged by appellant, and the position that appellant now wants this court to adopt, is expressed in her opening brief to the effect that the presumption that Shanahan was exercising ordinary care and was obeying the law "**is a presumption that does stand in the face of testimony which overcomes it . . . to instruct that the presumption cannot stand in the face of testimony which overcomes it I submit is erroneous**" (Appellant's Opening Brief, page 10)(Emphasis added). We submit that on its face the argument of appellant is untenable. To say that a presumption will stand even though "overcome" is a con-

tradiction of words.[51] *Webster's New International Dictionary* defines "overcome, v. t." as "to get the better of, to surmount, conquer, subdue." From the simple meaning of the words used it obviously cannot be error to instruct the jury that if the presumption were "overcome" it could not stand. Possibly appellant would place a different meaning on the word "overcome." Certainly we cannot assume that the jury understood the word to mean anything different than its ordinary or customary meaning. It is submitted that to accept the argument of appellant would be to make the presumption conclusive. The simple answer is that the statute creating the presumption expressly states that it is not conclusive, that it is a disputable presumption, and may be controverted by other evidence (California Code of Civil Procedure, § 1961 and § 1963).

The instructions given by the court touching the presumption in question are as follows:

> "The law presumes that Ellis E. Shanahan, now deceased, in his conduct at the time of and immediately preceding the accident in question, was exercising ordinary care and was obeying the law. This presumption is a form of prima facie evidence and will support findings in accordance therewith in the absence of evidence to the contrary. Other evidence, if any, which the jury finds conflicts with such presumption must be weighed by the jury against the presumption, and any evidence which may support the presumption, to determine which, if either, preponderates. Such delibera-

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51. Regarding the presumption that appellee exercised ordinary care and obeyed the law, the court instructed the jury "This presumption is evidence for the defendant and it remains as evidence in the case until *met or overcome* by other evidence, if any" (R. 530). (Emphasis added.) This instruction is not assigned as error.

tions, of course, shall be related to and in accordance with the Court's instructions as to the burden of proof." (R. 542)[52]

"Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if proved, conclusively establishes the fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, although true, does not of itself conclusively establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences. *A presumption is a deduction which the law expressly directs to be made from particular facts, unless declared by law to be conclusive, it may be contraverted by other evidence, direct or indirect; but unless so controverted the Jury is bound to find in accordance with the presumption.*

"An inference is a deduction which the reason of the Jury draws from the facts proved. It must be founded on a fact or facts proved, and be such a deduction from those facts as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business or the course of nature." (R. 568-569) (Emphasis added.)

The two above instructions were given at the request of appellant, and the second of the above two was given after the jury had been first charged and appellant had objected

52. The giving of this instruction, requested by appellant, was objected and excepted to by appellee (R. 563-564). The facts proved by appellant's own witnesses, Hewes and DeRosa, are irreconcilable with any presumption of due care and such presumption was dispelled and disappeared from the case as matter of law. (See footnote 48, page 32, above.)

and excepted to the failure to give such instruction. (R. 560, 561) The jury was then called back and further instructed as above set forth. (R. 568) The instruction given at the request of appellee as to which error is now assigned must be read and understood in the light of the above two instructions given at the request of appellant. The instruction complained of is as follows:

> "You are instructed that such a presumption cannot stand in the face of testimony which overcomes it. If the presumption has been overcome by testimony it passes out of the case. In addition, this presumption exists only in the absence of proof of the facts. If in this case you determine from the evidence what the facts and circumstances of this accident were, and what the person injured actually did, then you must determine whether or not he exercised the care and vigilance for his own safety which the circumstances required, by a consideration of the facts as you find them, and without regard for any presumption that care was exercised. If you find the actual fact as to what the person who was injured did, there is no room for any presumption as to what he did or for any presumption that he exercised care." (R. 542-543)

The above instruction is correct in every respect. Standing alone, the jury could not have been misled, its meaning is clear and simple. There is no inconsistency between any of the instructions. Certainly when all of the instructions were read as a whole there could be no misunderstanding.[53]

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53. The court further instructed the jury as follows:
"I express no opinion as to the facts or the evidence. Nor do I wish you to understand or conclude from anything I may have said during the trial, or in the course of my instructions, that I have intended directly or indirectly to indicate any opinion on my part as to the facts or as to what I think your finding should be.

Assuming *arguendo* that the instruction complained of is technically incorrect, it cannot be questioned that any misconception or misunderstanding that the jury might have had was cured and set at rest by the last instruction given to the jury at the request of appellant which expressly told the jury that the presumption "may be contraverted by other evidence, direct or indirect; but unless so contraverted the jury is bound to find in accordance with the presumption" (R. 568).

Preliminary Matters.

We repeat, because obviously appellant has either overlooked it or studiously avoided it, this case was submitted to the jury on all issues. It was not determined as matter of law. It was not determined on motion for non-suit or on motion for directed verdict (although we contend it could have and should have been). The court did not instruct that the presumption of due care had been overcome as matter of law.[54] It was left for the determination of the jury whether or not the presumption was overcome by the evidence. In every case cited by appellant in her opening brief the court recognizes that unless the presumption is dis-

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Ladies and gentlemen, you and you alone must decide the facts. In your deliberations you must wholly exclude any sympathy or prejudice from our minds." (R. 520)

"If in these instructions any rule or idea be stated in varying ways, as for example, that you are to find for one of the parties if you find certain facts to be true, no emphasis thereon is intended and none must be inferred. You are not to single out any certain sentence or any individual point or instruction and ignore the others. You are to consider all of the instructions as a whole and regard each in the light of all the others." (R. 522)

54. The court could have and should have. The instructions requested by appellant regarding the presumption of due care should not have been given. Any such presumption was dispelled as matter of law.

pelled as matter of law, it is for the jury's determination whether or not the presumption will stand or has been overcome. The jury made such determination in this case. Every case cited by appellant in her opening brief is authority for the action of the trial court in this case in submitting the issue to the jury.[55] Every case cited by appellant in her opening brief is authority that there was no error in the instructions in this case. We could rest our argument on the authorities cited by appellant. It is perfectly clear that the only cases in which there has been a reversal on the basis of this presumption were cases in which the matter was determined by the court as matter of law, on motion for non-suit or motion for directed verdict, and those cases are distinguishable and inapplicable here.[56] This case was submitted to the jury and the determination was made by the jury.

We, of course, do not know whether the jury based its verdict on a finding that appellee was not negligent or on a finding that Shanahan was contributorily negligent. We submit, on the evidence, the jury must have found on both grounds. Assuming error as now urged by appellant, such error would, of course, go only to the question of contributory negligence. Assuming that the jury found in accordance with the presumption that Shanahan was not negligent, that could be no basis for a finding that appellee was

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55. Every case cited by appellant in her opening brief is authority that here the presumption of due care was dispelled as matter of law.

56. No case has been cited by appellant, and we are confident she can find none, in which a judgment was reversed in favor of a party invoking the presumption where the issue was presented to the jury for its determination. In every case the reversal is on the ground that the issue should have been submitted to the jury, as was done here.

negligent. There is no substantial evidence from which the jury could have found that appellee was negligent. On that issue appellant is aided by no presumption. Certainly the preponderance of the evidence is in favor of the finding that appellee was not negligent.

Argument.

By the instruction requested by appellant the jury was told that the law presumes that Shanahan exercised ordinary care and obeyed the law, and that the presumption is evidence to be weighed by the jury against any conflicting evidence, and it was for the jury to determine which, if either, preponderated. It was immediately after that instruction that the complained of instruction was given. The jury could not have been misled, there could have been no misunderstanding. The jury was told the presumption did exist and it was its determination where the preponderance lay. Certainly the jury could not have understood that in the next breath the court was instructing that the presumption did not exist and that they were not to consider the presumption in determining the preponderance. The court did not so instruct. To attempt to place such construction on the court's instruction would be contrary to good sense, good logic, and the common understanding of men.

If any member of the jury could have been misled or could have had any misconception there can be no question that the further instructions of the court removed any possible doubt. After the charge had been completed the jury was excused for the purposes of objections and exceptions by the parties to the charge. The jury was then recalled and at the request of appellant was further instructed that the presumption was evidence and unless contraverted by

other evidence the jury was bound to find in accordance with the presumption. Certainly by this instruction the jury must have understood that it was for its determination whether or not the presumption had been "contraverted by other evidence" (R. 568). This instruction was requested by appellant. Coming as it did as the last instruction to the jury, and separate and apart from the other instructions and after an interval of time it must have carried particular emphasis in the minds of the jurors. In clear and precise language as requested by appellant, the jury was told it was for it to determine whether or not the presumption was to stand or was "overcome." It was for the jury to determine, considering the presumption as evidence, where the preponderance lay. This is squarely in accord with every case cited by appellant.

But even standing alone, without regard to any other instruction, the instruction complained of is proper and correct. The instruction, of course, must be read as a whole, isolated phrases and sentences cannot be dissected from it to show error. By the instruction the jury was told that if the presumption were overcome it passed out of the case. Further, the jury was told that if it found the actual facts and what decedent actually did, there was no room for any presumption as to those facts or as to what decedent did. The jury was not told that the presumption was overcome. The jury was not told, as implied by appellant's argument, that the presumption was overcome merely by the existence of conflicting evidence. The jury was told that it was for its determination whether or not the presumption were overcome.

The presumption of due care is a disputable presumption (Code of Civil Procedure § 1961 and § 1963). Every

case cited by appellant recognizes and holds that the presumption is disputable. This means that the presumption may be disputed by other evidence. If it may be disputed, obviously it may be "overcome" by other evidence.[59]

A disputable presumption is a substitute for the proof of facts.[60] The purpose and reason for raising the presumption is because of the absence of proof of the facts. If the facts are proven the basis for the presumption is gone and there is no room for the presumption.[61] Whether or not the facts were proven is for the determination of the trier of fact. If the trier of fact makes such determination and finds that the facts have been proven the presumption then passes out of the case.[62] The trier of fact in reaching its determination of the proven facts must weigh conflicting evidence to determine where the preponderance lay. In weighing the evidence the trier of fact is to consider as evidence the presumption, so that there is on the one hand the presumption and any evidence in support of the presumption, and on the other hand the conflicting evidence.[63] If the

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59. Here it was "overcome" as matter of law. The testimony of appellant's own witnesses, DeRosa and Hewes, left no room for the presumption. (See footnote 48, page 32, and footnote 52, page 37.)

60. *Speck v. Sarver,* 20 C.2d 585; *Simonton v. Los Angeles T. & S. Bank,* 205 Cal. 252; *Williams v. Hasshagen,* 166 Cal. 386; *Hughes v. A. T. & S. F. Ry. Co.,* 121 Cal. App. 271.

61. *Westburg v. Willde,* 14 C.2d 360; *Paulsen v. McDuffie,* 4 C.2d 111; *Rogers v. Interstate Transit Co.,* 212 Cal. 36; *Williams v. Hasshagen,* 166 Cal. 386; *Clary v. Lindley,* 30 C.A.2d 571; *Dull v. A. T. & S. F. Ry. Co.,* 27 C.A.2d 473; *Maryland Casualty Co. v. Little,* 102 Cal. App. 205.

62. *Smellie v. Southern Pacific Co.,* 212 Cal. 540, and cases cited in footnote 61 above.

63. In *Smellie v. S. P. Co.,* 212 Cal. 540, in discussing the effect of contradictory evidence on the presumption, the court said at page 553: "In such case their [presumptions] guiding and com-

trier of fact finds in accordance with the conflicting evidence, the presumption, just as the evidence in support of the presumption, has served its full purpose and passes out of the case.[64] On the other hand if the jury find in accordance with the presumption and its supporting evidence, if any, again the presumption has served its purpose, and the presumption, as evidence, will support the findings of the jury.

In Clary v. Lindley, 30 CA(2d) 571, 573, the court said:

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pelling effect is undermined and diminished or destroyed to the extent that they are controlled by the facts as found to exist."

In *Beers v. California State Life Insurance Co.*, 87 Cal. App. 440, the court said at page 464: "* * * a presumption is evidence (Code Civ. Proc. secs. 1957-1961), and that, while as against a proved fact, or a fact admitted, a disputable presumption has no weight, yet, where it is sought to prove the fact against the presumption, it still remains with the jury to say whether or not the fact has been proved, * * *."

64. The presumption is evidence but is no better or stronger than any other evidence. In fact, it has been repeatedly held that a disputable presumption is the weakest and least satisfactory evidence. *Beers v. California State Life Insurance Co.*, 87 Cal. App. 440.

In *Simonton v. Los Angeles T. & S. Bank,* 205 Cal. 252, the court said at page 258:

> "* * * Disputable inferences or presumptions, such as appellants here rely upon, have been said to be the weakest and lease satisfactory character of evidence (*Savings & Loan Soc. v. Burnett,* 106 Cal. 514 [39 Pac. 922]). They are allowed to stand, not against the facts they represent, but in lieu of proof of them. When not controverted, however, the court or jury is bound to find according to the presumption. When controverted by other evidence, whether direct or indirect, an issue of fact is raised which it is the duty of the court to determine as in other cases, and its conclusion is conclusive upon an appellate court unless it be manifestly without sufficient support in the evidence (*Fanning v. Green,* 156 Cal. 279 [104 Pac. 308])."

In *Anderson v. Southern Pacific Co.,* 129 Cal. App. 206, the court points out that to overcome the presumption "evidence sufficient only to balance the presumption need be introduced to overcome it," it is not required that it be overcome by a preponderance of the evidence.

"'A disputable presumption is a substitute for proof of facts. It is a species of evidence that may be accepted and acted upon when there is no other evidence to uphold the contention for which it stands.' *(Noble v. Key System, Ltd.,* 10 Cal. App. (2d) 132, 137 [51 Pac. (2d) 887].) It may be contraverted by evidence. (Code Civ. Proc., sec. 1961.) It is dispelled when evidence is produced by the party or his witnesses covering the subject of the presumption. *(Rogers v. Interstate Transit Co.,* 212 Cal. 36 [297 Pac.(2d) 914].) When there is a conflict in the evidence introduced by opposing parties, there is no room for the presumption *(Kelly v. Fretz,* 19 Cal. App. (2d) 356 [65 Pac.(2d) 914]), for the simple reason that one side or the other would be forced to introduce evidence to controvert other evidence, plus a presumption." *(Paulsen v. McDuffie,* 4 Cal.(2d) 111 [47 Pac.(2d) 709]; *Mundy v. Marshall,* 9 Cal.(2d) 294 [65 Pac.(2d) 65].)

The argument of appellant is bottomed on the case of *Smellie v. Southern Pacific Co.,* 212 Cal. 450.[65] That was an appeal from a judgment entered on a directed verdict in a death case. The case is clearly distinguishable for the reason that the question was presented and decided under the rules applicable to non-suit and directed verdict, and any evidence produced by defendant was eliminated from consideration. The question in the *Smellie* case was simply whether or not the presumption had been dispelled as matter of law. The opinion of the court clearly distinguishes

65. The court recognizes the rule that testimony on behalf of the party invoking the presumption as to the actual facts will dispell the presumption as matter of law, and the court goes on to say, at page 552, "* * * but it does not necessarily follow that the presumption may not be overcome or 'dispelled' as a matter of law by proof of the party against whom the presumption is invoked."

the case where the question is presented to the trier of fact. The case recognizes that the presumption is a disputable one and may be overcome and also that if the facts are proven or if the jury finds the actual facts there is no room for any presumption. The case is authority for the action of the trial court in this case.

Appellant quotes on page 29 of her opening brief the case of *Westburg v. Willde,* 14 C.2d 360, that the presumption shall stand "until and unless it is overcome by satisfactory evidence." This identical language appears in a number of the other cases cited by appellant. Appellant in her argument makes some point of the use of the word "testimony" in the instruction complained of. The cases cited by appellant used the words "evidence" and "satisfactory evidence." "Testimony" is "evidence," and is "satisfactory evidence."[66] The cases all hold that the presumption may be "overcome" by "evidence" and "satisfactory evidence." The presumption may be "overcome" by "testimony." We submit the instruction could not have more clearly followed the cases cited by appellant even by direct quotation. The meaning of the language used is identical and the jury could not have misunderstood it.[67] To elimi-

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66. The term "testimony" is, of course, more restricted than the term "evidence." "Testimony" is only one form of "evidence." Here the physical facts and circumstances, "evidence," weighed as heavily in favor of appellee as the "testimony," and we submit that if either party is in a position to object to the use of the word "testimony" in the instruction it would be appellee, not appellant.

67. Appellant attempts to make something from the use of the word "injured" in the instruction and suggests that the word should have been "killed." Certainly one who dies as the result of an accident has been "injured," and appellant, in her complaint, alleges that decedent received and sustained "serious bodily injuries, from which injuries said Ellie E. Shanahan died" (R. 3).

nate any doubt the instruction given by the Court at appellant's request after the objections and exceptions to the charge and when the jury was recalled, uses the term "evidence."

Appellant also relies very strongly on the case of *United States v. Fotopulos,* 180 F.2d 631. That was a case in which the trial court, sitting without a jury, had found that the decedent had exercised due care, and the court of appeals merely held that the presumption of due care was available to support this finding. The result cannot be questioned but the case has no applicability here. As pointed out by the court in the *Fotopulos Case,* at page 638, "* * * the question is one for the jury." Here the question was submitted to the jury.

In the final analysis appellant's argument is that in a death case, where decedent is not available to testify, the presumption that decedent used due case is indisputable and conclusive. That is not the law, and the cases cited by appellant do not so hold. The cases cited by appellant hold that, unless it can be said that decedent was guilty of contributory negligence as a matter of law, the jury should be instructed on the presumption of due care. The jury in this case was so instructed. The cases cited by appellant hold further that it is for the jury's determination whether or not that presumption has been "overcome." The jury in this case was so instructed. Appellant would argue that the instruction complained of told the jury that the presumption was overcome as matter of law. It did not. The instruction told the jury only that *if* the jury should find that the presumption were "overcome," and that determination was theirs alone, then they could no longer con-

sider the presumption. This is squarely in accord with the cases cited by appellant.

The conclusive answer to appellant's contention, and to her entire case, is that the presumption of care on the part of a motorist, in circumstances such as here, has been uniformly held to be rebutted as a matter of law. The deceased driver of an automobile may be held to be guilty of contributory negligence as a matter of law in railroad crossing cases. The cases hold that under the law of railroad crossings, due care of the driver is measured by established standards of conduct. If the driver does not stop, look and listen, or doing so fails to see or hear, he is held to be contributively negligent and there is no room for the presumption.

There are many cases where the presumption of due care of a deceased has been urged in support of a verdict, the contention being made that the presumption created a conflict. In these cases it is held that the presumption is dispelled—and verdicts for the plaintiffs have been reversed or non-suits and directed verdicts for defendants affirmed.

The following cases are death cases—actions for wrongful death—in each of which the highway traveler was killed at a railroad crossing, and in each of which it was held, regardless of the presumption of due care, that the deceased driver did not exercise care and that the action was barred by the defense of contributory negligence as a matter of law. The following cases were all decided since the *Smellie* case, and in the light of the rule of the *Smellie* case:

Heintz v. S. P. Co., 63 C.A.2d 699 (hr. den.) Nonsuit affirmed;

Dull v. A., T. & S. F. Ry. Co., 27 C.A.2d 473, Directed verdict for defendant affirmed;[68]

Pacheco v. S. P. Co., 129 Cal. App. 6101, Non-suit affirmed.[69]

Friddle v. S. P. Co., 126 Cal. App. 388, Judgment for plaintiff reversed.

Hughes v. A., T. & S. F. Ry. Co., 121 Cal. App. 271 (hr. den.) Judgment for plaintiff reversed.

Rowe v. So. Cal. Ry. Co., 4 Cal. App. 1, Non-suit affirmed.

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68. The court said at page 477:

"* * * From the facts as they are contained in the record, it appears that the deceased approached an open railroad crossing with a clear view of the tracks in both directions from a point sixty feet away from the crossing; that as she approached the railroad tracks she slowed down to about two miles per hour, and then drove up a short incline and onto the tracks, where she was struck by the train. Driving an automobile which the appellant, who was the owner thereof, testified could be stopped within twelve or fourteen feet when going twenty miles per hour, and within about nine feet when going twelve or fifteen miles per hour, we find the deceased, according to the evidence, going twenty miles per hour when within five hundred feet of the crossing in question, and at a much slower speed for the last sixty feet, with an unobstructed view, still continuing to drive up to and upon the track in the face of the fast approaching train. With this picture, it would be idle to attempt to show ordinary care or prudence upon the part of the deceased. As a matter of fact, in order to justify the conduct of the unfortunate decedent, we would be first compelled to overrule every known California case involving accidents at railroad crossings. Appellant relies largely upon an indulgence of the presumption of ordinary care and diligence on the part of decedent from all the circumstances of the case and the natural instinct of self-preservation—and contends that because thereof the motion for a directed verdict should have been denied. However, this presumption arises only in the absence of direct proof of the facts. The circumstances of this case alone are sufficient to rebut the presumption claimed."

69. Holding that stopping for an arterial stop sign at a point where the traveler cannot see does not satisfy the railroad crossing rule.

In *Hughes v. A., T. & S. F. Ry. Co.,* 121 Cal. App. 271, 277, the court considers the rule in the light of the *Smellie* case, finds no disagreement between the two and concludes the presumption of §1963 does not raise a conflict. The court says:

> "When the evidence is undisputed that the view of the deceased was unobstructed so that if she had looked she could have seen the approaching train, that the noise of the train taken with the crossing signal and the ringing of the bell was so great that if she had listened she could have heard, and that if she had stopped at any point within the 70 feet of approach to the tracks she could have discovered the approaching train in time to avoid injury, there is no fact in evidence upon which a presumption could be founded that she was taking ordinary care of her own concerns at the time. On the other hand there is strong presumption that if she had looked she would have seen and if she had listened she would have heard the approaching train (*Young v. Southern Pac. Co.,* 189 Cal. 746, 754 [210 Pac. 259]: *Cate v. Fresno Traction Co.,* 213 Cal. 190 [2 P.2d 364].) In such a case the weight of the presumption of ordinary care as evidence is precisely the same as the weight of testimony which is so unreasonable and improbable that the appellate court will say that it does not constitute a substantial conflict."

Appellee respectfully submits that in this case decedent was guilty of contributory negligence as matter of law. Certainly appellant cannot be heard to object where the jury was fully and properly instructed that decedent is presumed to have used due care, and the question of the contributory negligence of decedent was left solely for the jury's determination.

Only one other comment need be made. On pages 26 and 27 of her opening brief appellant makes reference to certain other instructions given by the Court. There is no claim that any of the referred to instructions are improper or incorrect, and no error is assigned to the giving of any of them. There can be no question or dispute that each of the referred to instructions is proper and correct (although in several instances appellant's paraphrasing of the instructions is inaccurate). No further comment is required.

IV.

CLAIMED ERROR IN THE EXCLUSION OF TESTIMONY

Appellant claims error in the ruling of the Court in striking from the record testimony of witness Tolson, called by appellant on rebuttal (R. 513). The testimony stricken referred to a claimed failure[70] of the wig-wag signal on a single occasion some thirty days prior to the date of the accident, while the signal was being tested by Signalman Rowe, who had been called as a witness for appellee. As indicated, the testimony referred only to an occasion thirty days prior to the accident.

At the outset there would seem to be no question that the exclusion of the proffered testimony, whether proper or improper, would be entirely immaterial if in fact the wig-wag signal was operating at the time of the accident. Appellant states in her opening brief, p. 38, that she had "proved" the wig-wag crossing signal was not working. The statement is entirely without support in the record. The first reference to the record referred to in appellant's

70. The testimony stricken did not relate to a failure. This is discussed below.

opening brief in support of her flat statement that the wig-wag crossing signal was not working is to the testimony of witness Tommy A. Hendrix, pp. 34 and 36 of the record.[71] This witness's testimony established no more than that 10 to 15 minutes before the accident he had driven over the crossing, there was no train coming, and the wig-wag then, quite properly, was not working.[72] We do not propose to repeat the evidence or facts as set out above, pp. 3-30, but submit that there is no probative evidence from which the jury could have found that the signal was not working at the time of the accident. There is positive evidence, uncontradicted, that the signal was properly operating. At best, the only evidence offered by appellant touching the issue of the operation of the wig-wag signal was the negative testimony of witnesses DeRosa and Hewes. As pointed out above, the substance of the testimony of both DeRosa and Hewes was only that they did not know whether the signal was working or not, and both admitted to Police Officer Sublett shortly after the accident that they were not looking for the signal.[73] It cannot be doubted that before the negative testimony of a witness that he did not see a signal can be given any probative value on the question of whether or not the signal was operating, it must appear not only that the witness was so situated that he could see but

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71. Other references relied on by appellant refer only to the testimony of Hewes and DeRosa which as pointed out above, had no probative value on this point.

72. After crossing the tracks Hendrix turned north and passed the train involved in the accident when it was five miles south of Redding (R. 36-43). Redding is approximately 11 miles from Anderson.

73. See pp. 17-18 below.

also that his attention was so directed that he would have seen if the signal had been operating.

Koster v. S. P. Co., 207 Cal. 753;
Shannon v. N. W. P. R. Co., 209 Cal. 303;
Lupes v. City of Los Angeles, 10 C.2d 476;
B. & O. R. Co. v. Baldwin, 144 Fed. 53 (C.C.A. 6);
Stitt v. Huidekoper, 17 Wall. 385, 21 L.ed. 644;
Penn R. Co. v. Swartzel, 17 F.2d 869 (C.C.A. 7);
Chicago etc. Ry. v. Sellars, 5 F.2d 31 (C.C.A. 8).

In *Chicago etc. Ry. Co. v. Sellars,* 5 F.2d 31, 33, the Court said:

> "The record discloses that the several witnesses who testified for the railroad company as to whether the locomotive headlight was burning, the bell rung, and the whistle blown, were in a position to see and hear, and their evidence is of a positive character, while the witnesses for the plaintiff were not so situated and *were not giving attention to these matters;* so no issue requiring the submission of these questions to the jury was made." (Emphasis added).

There is not a scintilla of evidence to support the claim that the wig-wag signal was not operating. It is submitted that on the record this issue should not have been submitted to the jury. As matter of law there was a complete failure of proof. In the circumstances the exclusion of the proffered testimony was wholly immaterial.

If it cannot be said that as matter of law there was a complete failure of proof on this issue, certainly on this record it cannot be doubted the great preponderance of the evidence was that the signal was properly operating. The positive testimony, from both independent and em-

ployee witnesses, has been detailed above at pp. 11-18 and will not be repeated. It cannot be doubted that on the whole case the jury could have reached no different conclusion than that the signal was operating. Assuming arguendo, therefore, error in striking the testimony of Tolson, such error could in no sense be considered prejudicial, and any such assumed error could be no ground for reversing the verdict of the jury.

There was no error in striking the testimony of Tolson.

The Facts.

Appellant claims error in striking the testimony of Tolson on the ground that such testimony contradicted the testimony of Rowe and was material to show knowledge of appellee that the signal was faulty. It apparently is appellant's contention that the testimony stricken was offered for the dual purpose of impeachment of witness Rowe and on the issue of negligence. The testimony was inadmissible for either purpose.

The stricken testimony must be placed in its proper setting. Witness Rowe was called by appellee. On direct examination he testified that he was employed by Southern Pacific Company as a signal maintainer in the area involved in this accident, and had been so employed for several years prior to the accident. He had inspected and tested this signal each working day from December 13 to December 27, and on each occasion found it working properly and no repairs were made. He inspected the signal at 9:20 on the morning of the 27th, about two hours after the accident. This inspection was made in the presence of the police and the coroner. At this time, the signal was

working properly and no repairs were required or made. From his experience, on the basis of the tests made immediately after the accident, nothing could have been wrong with the signal at the time of the accident, 2 to 2½ hours before (R. 277, 280-283, 287-288).

On cross examination, **over the objection of appellee**, Rowe testified that so far as he could recall, since he had been maintaining the district, this signal had never been out of order, or repaired. The only time that appellant's attorney referred to any particular instance was when he asked Rowe if it were not a fact that the signal had been out of operation an entire day three or four months before the accident. **Over the objection of appellee** the witness answered no, he did not recall that (R. 294). Appellant did not press the matter further. She did not refer to any particular instance or time, except for the one reference to a time three or four months prior to the accident. The basis of the objection by defendant was that the testimony was incompetent, irrelevant and immaterial. We submit that the objection was well taken. The testimony is entirely collateral to the issue at hand, whether or not the signal was operating at the time of the accident. The only period of time covered on the direct examination of Rowe was from December 13 to December 27. There was positive testimony that the signal operated properly on two occasions within one hour before the accident, the last occasion being 10 to 15 minutes before the accident.[74] Evidence of the condition of the signal 30 days before the accident is obviously collateral and too remote. If not remote and collateral it was for appellant to prove the relevancy of

74. See pp. 12-13 above.

the offered testimony. The Court cannot guess or speculate as to its relevancy or materiality. There was no such proof or offer of proof.

Witness Tolson was called by appellant in rebuttal. The testimony in question appears at pages 508-515 of the Transcript. Appellant's counsel asked the witness "Do you recall any occasion prior to the collision when the wig-wag signal did not operate?" (R. 508). The question was objected to as incompetent, irrelevant and immaterial and not proper rebuttal. Appellant's counsel in arguing the matter referred to the testimony of Mr. Rowe which had been elicited by appellant on cross-examination over the objection of appellee. The Court sustained the objection on the ground that it was an attempt to impeach a witness on a collateral matter (R. 511). When asked by the Court to fix the time to which he was referring appellant's attorney referred to the testimony of Mr. Rowe, on cross-examination over objection by appellee, that he did not recall an instance three or four months prior to the accident when the signal had been out of operation. The Court stated that was a collateral matter (R. 509). Appellee then enlarged on its objection on the ground that the testimony could not be impeachment of Rowe for there was no foundation to show Rowe knew about the incident referred to (R. 510). Appellant's attorney conceded that the matter referred to was collateral when he stated (R. 511):

> "It would be a purely collateral issue had counsel not established that point in his own testimony and absolutely stated the signal had never been out of order during the four years."

Appellant's attorney overlooks the fact that the testimony referred to was not a part of appellee's case, but was

brought out **on cross-examination over the objection of the appellee.** Appellant's attorney then put a further question to the witness and the following occurred (R. 511-513):

"Mr. Murman: Q. Mr. Tolson, prior to the accident did you on any occasion notice that the signal stuck and remained in a position other than a vertical position after a train went by?

Mr. Phelps: Same objection, if your Honor please; it isn't proper rebuttal, wouldn't tend to impeach—

The Court: It isn't proper rebuttal. It really isn't proper rebuttal. You should have put it in at the beginning of your case, but I will allow the question if it is directed to a point that is within a reasonable time.

Mr. Murman: All right.

The Court: A day or so before or afterwards, maybe even a week.

Mr. Murman: All right, I will ask that question.

Q. Mr. Tolson, how long—

Mr. Phelps: I want to enlarge on the objection, that it is leading and suggestive.

The Court: Yes, but I will allow it.

Mr. Murman: Q. Mr. Tolson, how long prior to the date of the accident do you last remember seeing the signal in a position other than a vertical position?

Mr. Phelps: Same objection, your Honor understands, runs to this line of questioning?

The Court: Yes.

Mr. Phelps: It wouldn't tend to impeach this witness, even remotely tend to impeach the witness. He was never asked about it. No notice on the part of the Southern Pacific Company.

A. Other than through his testing, that I would say, it was within, oh, 30 days, anyway. I have seen him when he was testing, it would hold in that position where is wasn't centered.

Mr. Phelps: I will ask that go out as too remote.

Mr. Murman: Q. When did the signal get that way?

A. **When he was testing it.**

Q. You said within 30 days of the accident?

A. I would say something like that. I don't remember the exact time or date, never paid particular attention to its position, but I have seen him take the signal and test it where it wouldn't be centered, and would stick to one side or the other and wouldn't come back.

Q. That was when he was testing it?

A. **That was when he was testing it.**

Mr. Phelps: May I please—

The Court: How long before the 27th day of December was this?

A. Well, directly, a direct day I couldn't answer that only just by saying it was within 30 days, sir, or something like that. It wasn't—it didn't come into my mind exclusively just what time that would be.

Mr. Phelps: Then, if your Honor please, I ask that the answer go out as too remote even under your Honor's ruling, confined within a day or two.

Mr. Murman: I submit it is rebuttal.

Mr. Phelps: It is not rebuttal.

The Court: I am going to strike the answer and instruct the jury to disregard the testimony. It isn't rebuttal and not impeachment.

Mr. Murman: Well, I beg to differ with your Honor, and under the circumstances I have no further questions."

As appears the witness was eventually permitted to answer the question. The only problem, therefore, is whether the court properly struck the answer on the motion of the appellee. The record speaks for itself. The ruling was correct.

Argument.

The basis on which appellant offered the testimony, and the basis for her objection to its exclusion are not exactly clear. Appellant has argued that the testimony should have been admitted both as rebuttal and as impeachment of the witness Rowe.

Appellant offered no evidence on her case in chief touching the operation of the signal a month or three or four months prior to the accident. To permit such evidence for the first time on rebuttal would be contrary to the established rules for the trial of a case, and would leave appellee in the position where it could not meet such testimony. In the sound discretion of the court it was properly excluded as rebuttal.

On the issue of negligence, the proffered testimony was not, in any event, admissible. Certainly evidence that the signal had not operated on a single occasion 30 days prior to the accident would not be competent or material on the question of whether the signal was operating on the day of the accident. Particularly is this true where there was positive evidence that the signal was operating properly on the day of the accident, and had been so operating since December 13th, 14 days before the accident. There was no attempt by appellant to rebut that testimony.

Appellant has argued that the testimony was admissible to show knowledge on the part of appellee that the signal was a troublesome one. Certainly a single instance of failure 30 days before the accident would not show such knowledge.

Again is this particularly true where the only evidence in the case is that the signal operated properly subsequent

to that claimed single failure and for the 14 days preceding the accident. No effort was made by appellant to contradict that evidence. The only knowledge which could be imputed to appellee was that the signal was operating properly.

The substance of Tolson's testimony in this regard is that at some indefinite time, he paid no particular attention to the time, but about 30 days prior to the accident, while Rowe was testing the signal, the arm would not be centered but would stay to one side or the other. Such testimony could have no probative value on any issue. Assuming that while testing the signal arm would stay to one side or the other, there is nothing to show that that would be a defective condition. There is nothing to show that such condition is anything more than a part of the normal testing procedure. There is nothing to show, or from which it can even be inferred, that because the arm stayed to one side or the other during testing that it was therefore out of order. The only time the condition existed was while the signal was being tested. The only possible inference is that it was a normal result of the testing.

If it was appellant's contention that the wig-wag holding in a position other than vertical during testing would indicate a defective condition, it would have been easy for appellant to have proved this from the witness Rowe when he was cross examining him. He could have and should have put a question to him by which the foundation would have been laid for the subsequent testimony by Tolson. He failed to establish the foundation that this was not a normal incident of testing although the witness was available from whom he might have established it.

There is nothing to show that because of this condition during testing that any repairs were made. To the contrary,

the only evidence is that no repairs were made. Appellant made no offer to contradict this. To conclude from this testimony that at the time referred to, some 30 days before the accident, the signal was out of order would be the purest kind of speculation.

It should be noted that the only thing established by the stricken testimony was that when the signal was tested it held in a position other than vertical. Assuming that the jury could speculate that this meant that there was a defective condition, the only inference the jury could have further drawn was that whatever the condition was it was corrected by Rowe then and there as he was testing it. It was Rowe's duty to correct any defective condition which he found and the jury were entitled to infer that any defective condition was repaired at that time. That this is the only inference the jury could draw is further confirmed by the fact that Tolson worked daily after this incident in the immediate vicinity of the signal and never again saw it in this same condition. This should be coupled with the fact that the evidence established that the signal was working at the time of the accident, on two occasions within an hour prior to the accident and that from December 14th to 27th on regular inspections it was found to be in working order. Taking all these facts, and these were the facts the Court and the jury had before them, no inference can be drawn of any defective condition from the incident described by Tolson.

Furthermore, even assuming that from this testimony we could, by speculation, conclude that the signal was defective 30 days before the accident, there is no evidence or offer by appellant to show that that condition continued

to the time of the accident, or for any period at all. There is no evidence or offer by appellant to show that appellee had any knowledge of any defective condition aside from this one particular instance some 30 days before the accident. To conclude from this testimony that the condition continued to exist up until the time of the accident and that appellee had knowledge of that again would be the purest kind of speculation. To permit such testimony to go to the jury would invite speculation on speculation. The testimony could have absolutely no probative value. As rebuttal or otherwise the testimony was wholly incompetent, irrelevant and immaterial to any issue in the case.

It is equally clear that the testimony was inadmissible to impeach witness Rowe. It would not impeach him. Appellant offered the testimony as being contradictory to that of Rowe. There is nothing in the record to indicate that it was in any way contradictory. The condition described occurred only while Rowe was in the process of testing. There is nothing to show that it was not a normal part of the testing procedure. There is nothing to show that the condition was a defective one. Rowe did testify, on cross-examination over the objection of appellee, that at no time while he had been maintaining the signal had it been defective or had any repairs been required. The testimony of Tolson is in no way contradictory. It could be considered contradictory only by indulging the purest speculation that the condition described was a defective one.

Assuming that we could indulge the speculation and conclude that the signal was defective at this indefinite time referred to, in the sound discretion of the court, the testimony was properly excluded. Rowe had at no time been

questioned about any such particular instance. To permit such testimony at this stage in the case would have been grossly unfair and unjust to witness Rowe. If the condition described did exist, Rowe would have had no opportunity either to dispute it or to explain it. Inasmuch as the condition existed only during the testing of the signal, the only normal inference is that it was a part of the testing procedure. There was no offer by appellant to show that it was not. Rowe was not questioned about it.

Finally, as stated by the court (R. 509), the testimony was properly excluded as an endeavor to impeach a witness on a collateral matter. There can be no question that it was collateral. It referred to a time some 30 days prior to the accident. No foundation was laid or effort made to in any way tie it in to the time of the accident. It was remote in time, and whether or not the signal was defective in a single instance some 30 days prior to the accident was wholly outside the issues of this case. Appellant's counsel recognized that it was a purely collateral issue when he stated (R. 511):

> "It would be a purely collaterial issue had counsel not established that point in his own testimony and absolutely stated that the signal had never been out of order during the four years."

Appellant's misconception is twofold. First, it apparently is her position that because the testimony was brought out on appellant's case (which it was not) it may be impeached by contradictory evidence even though collateral. This is not the rule. A witness may not be impeached on collateral matters, irrespective of whether the collateral matters were

originally brought out on direct or cross-examination. *(People v. Wells,* 33 C.2d 330, 340).

Appellant's second misconception is that the testimony of Rowe which appellant now is endeavoring to contradict was not brought out on appellee's case, but was elicited by appellant on cross-examination over the objection of appellee (R. 288, 294). The rule is stated in 27 Cal. Jur. page 107 as follows:

> "Accordingly, a party may not cross examine his adversary's witnesses upon irrelevant matters for the purpose of eliciting something to be contradicted; if he does this the answer of the witness is conclusive and may not be contradicted."

And at 27 Cal. Jur. page 148:

> "It has already been seen that a party may not cross examine his adversary's witness upon irrelevant or collateral matters for the purpose of eliciting something to contradict, but that if such matters are drawn out they may not be contradicted."
>
> "The statement of the witness must be pertinent to the issues on trial, or they cannot be contradicted."
>
> *Steen v. Santa Clara etc. Co.,* 134 Cal. 355, 356.

See also *Trabing v. Cal. Nav. etc. Co.,* 121 Cal. 137, 144. The rule is beyond dispute.

Furthermore, the cross-examination of Rowe, which appellant now is endeavoring to contradict, went far beyond the direct examination. The direct examination was limited to that period between December 13 and December 27, a period of 14 days prior to the accident. On cross-examination appellant went back 30 days, three or four months, and several years, again over objection. If the cross-examina-

tion goes beyond the scope of the direct examination, the party cross-examining is bound by the answers, and the witness may not be impeached as to such matters by the party eliciting the testimony. The cases are many and we cite only a few.

Trabing v. Cal. Nav. etc. Co., 121 Cal. 137, 144;
Burchley v. Silverberg, 113 Cal. 673;
Sales v. Bacigalupi, 47 C.A.2d 82 (hr. den.).

We call the court's attention to one other case. In *Steinberger v. California Electric etc. Co.,* 176 Cal. 386, 393, it was held that negligence could not be proved by proof of similar instances, that such evidence was collateral and the witness could not be contradicted or impeached regarding it. The trial court in permitting such impeachment was guilty of prejudicial error. So here negligence could not be proved by showing a single instance of a defective condition some 30 days prior to the accident. The matter is entirely collateral and inadmissible, as the trial court correctly held.

V.

OTHER CLAIMED ERRORS IN INSTRUCTIONS

The exact nature of the complaint now made by appellant to the balance of the charge to the jury is not quite clear. She apparently is complaining that the court, in the course of the charge, gave certain hypothetical instructions by which the jury was told that if they were to find certain facts their verdict must then be for the appellee. As pointed out above, page 29, the verdict in this case should have been directed for appellee either on the ground that there was a complete failure of proof of negligence or on the

ground that decedent was guilty of contributory negligence as matter of law. In the circumstances, of course, any error in any instruction is immaterial.

Even if the evidence does not go so far as to require a judgment for appellee as matter of law, still appellee's case was "so strongly proved that the jury could not reasonably have found otherwise" than it did *(Shuey v. Asbury,* 5 C2d. 712) and any assumed error in the instructions is immaterial.

But there was no error in the instructions.

As to the complaint now made by appellant there is a short and conclusive answer. On the conclusion of the charge, the court gave to each party the opportunity to make exceptions and objections (R. 560). In fact, in the face of an objection by appellant, the court further instructed the jury on its return (R. 568). As to each of the instructions of which appellant now complains no exception was taken or objection made on the trial and appellant is now foreclosed from assigning as error the giving of any such instruction. Appellant recognizes the rule and attempts to argue that there should be exception made in this case. There is no basis or reason for departing from the rule.

Both the rule and the reason for the rule are clear and obvious. Rule 51 of the Federal Rules of Civil Procedure provides:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

We cite only a few of the many cases. *Teller v. Athens,* 7 F.R.D. 88 (1946); *McHugh v. Audet,* 72 F. Supp. 394 (1947); *Bernstein v. Olian,* 77 F. Supp. 672 (1948) (reversed on other grounds, 174 F.2d 880).

As the court said in the Bernstein case, above at pages 674-5:

> "This charge was given without objection on the part of either of the defendants. Ems Corporation having acquiesced in having the case submitted to the jury on that basis, authority is legion, both before and since Rule 51, F. R. Civ. Proc., that it is not now free to relitigate the matter because the verdict has gone other than it had anticipated. To move for a new trial on the basis of inconsistency of the verdict when an unobjected to instruction permitted the alleged inconsistency, falls within the prohibition of Rule 51." Citing cases.

Appellant can claim no surprise as to any of the instructions, appellee's proposed instructions were presented to counsel in the early stages of the trial. Furthermore the event complied with Rule 51 of the Federal Rules of Civil Procedure and informed counsel, prior to argument, of what instructions requested by the parties would be included in the charge to the jury (R. 494-495). Any error claimed, if it were error, could have been corrected if the proper objection had been made, as was done with the first objection made by appellant to the charge (R. 560 and 568). This case falls squarely within both the rule and the reason for the rule.

But there was no error in any instruction. We submit that every instruction as to which complaint is now made is proper and correct. Appellant points to no particular in-

struction to make the claim that it is not proper and correct. She can not. Appellant is not so bold as to claim she was entitled to judgment as matter of law. The most that she can claim is that the issue of negligence and contributory negligence were for the jury's determination. We can not suppose that appellant is claiming that the jury is to determine those issues without first being properly instructed. This case was submitted to the jury on all issues, after the jury had first been fully and properly instructed.

By dissecting certain phrases from the instructions, appellant attempts to place undue emphasis on the wording used. The charge must be read as a whole and the court so instructed at the request of appellant (R. 522). Furthermore, at appellant's request, the jury was specifically instructed that they need infer no emphasis from any instruction, when the court told the jury "If in these instructions any rule or idea be stated in varying ways, as for example, that you are to find for one of the parties if you find certain facts to be true, **no emphasis thereon is intended and none must be inferred.**" (R. 522) (Emphasis added).

A complaint similar to that now made by appellant was answered by the court in *Murray v. Southern Pacific Company,* 91 CA2d. 107, at 112 as follows:

> "Appellant also complains that certain instructions were argumentative and repetitious as ground for reversal. However, it is a well settled rule that errors of the trial court in instructions do not call for a reversal unless the appellate court after a review of the evidence and consideration of the entire case concludes they resulted in a miscarriage of justice. (Code Civ. Proc., § 475; Const., art. VI, § 4½; *Caminetti v. Im-*

perial Mut. L. Ins., Co., 59 Cal. App. 2d 476, 488 [139 P.2d 681].) Appellant's complaint is really a hypercritical analysis of these instructions rather than an assignment of prejudicial error. A statement of a rule of law may appear argumentative, and such statements may be repetitious because of a desire to make them clear. But that alone is not reversible error. We find no miscarriage of justice."

The real complaint of appellant seems to be that the instructions given are clear and the language used conveyed its meaning to the jury without ambiguity or possibility of misunderstanding.

CONCLUSION

No discussion of the claim made by appellant that her motion for new trial should have been granted is necessary. It is respectfully submitted that the judgment must be affirmed. It should be affirmed on the ground that decedent was guilty of contributory negligence as matter of law, and on the ground that there was no evidence of negligence on the part of defendant and appellee. There was no error either in the instructions or in the exclusion of testimony. Plaintiff has had her full day in court. The verdict and judgment are manifestly right.

Dated: December 18, 1950.

A. B. Dunne
Louis L. Phelps
Dunne & Dunne
Attorneys for Appellee